No. 86-421

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY
INTERNATIONAL, et al.,
Appellants,
v.
ROTARY CLUB OF DUARTE, et al.,
Appellees.

On Appeal From the Court of Appeal
of the State of California
Second Appellate District

BRIEF OF THE EMPLOYMENT LAW CENTER OF THE LEGAL AID SOCIETY OF SAN FRANCISCO AS AMICUS CURIAE IN SUPPORT OF APPELLEES ROTARY CLUB OF DUARTE, ET AL.

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The Employment Law Center of The
Legal Aid Society of San Francisco
Respectfully Submits This Brief
as Amicus Curiae in Support of
Appellees, Rotary Club of Duarte, et al.

INTEREST OF AMICUS CURIAE

The Employment Law Center, the principal project of the Legal Aid Society of San Francisco, is nationally recognized

for its expertise regarding state and federal laws prohibiting employment discrimination. It has pioneered the employment field for over a decade. It focuses on legal problems of disadvantaged people as they seek to secure and retain employment and represents those who find opportunity denied them for reasons other than their ability to do the job.

This case presents the question of whether a state may prohibit sex discrimination in large, unselective organizations that sell leadership training, business contacts, and employment opportunities to their members. Such organizations provide extensive and important employment-related opportunities to members, and their continued exclusion of women presents a substantial impediment to the integration of women into the

workforce. As an organization concerned with securing full equality in employment opportunities for minorities and women, the Employment Law Center has a strong interest in this case, and respectfully submits this brief in support of the Rotary Club of Duarte.

SUMMARY OF ARGUMENT

I. This Court has already determined that large, unselective, business and civic organizations like the Jaycees and the Rotary can be required to admit women under state "public accommodations" acts. Roberts v. United States Jaycees, 468 U.S. 609 (1984). The facts of the case at bar fall squarely within the holding in Roberts, and therefore this case presents no substantial Federal question, and should be dismissed for lack of jurisdiction.

II. A. The fundamental freedom of intimate association protects highly personal relationships such as marriages and families. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965). The First Amendment does not protect the interaction of business acquaintances brought together in a large civic and business organization. In Roberts, this Court held that such organizations are not sufficiently small, selective or exclusive to merit the extensive constitutional protection afforded to intimate family relationships. 468 U.S. at 621. That holding is fully applicable to the case at bar.

B. A non-intimate group's First Amendment freedom of association is limited to its expressive activity. Runyon v. McCrary, 427 U.S. 160, 176 (1976). Unlike Jaycees, Rotary's only expressive activity is its community

work, and therefore Rotary's freedom of association rights are limited to the protection of that expression.

III. States have a compelling interest in prohibiting sex discrimination in business organizations like Jaycees and Rotary that sell leadership programs, business contacts, and employment opportunities to members in exchange for dues. Roberts, 468 U.S. at 626.

IV. There is no significant infringement of expression unless there is a significant effect on the content of speech. Roberts, 468 U.S. at 627. In Roberts, this Court held that the admission of women would not significantly affect the content of Jaycees' speech, and that holding applies with equal force to Rotary. Members' preference for discrimination is not protected, Runyon, 427 U.S. at 170, and International's plea of international pressure is contradicted

by its willingness to face such pressure and admit Black members. Since the content of Rotary's speech would not be significantly affected by the admission of women, the state's prohibition of sex discrimination by Rotary is the least restrictive means of accomplishing its compelling interest.

VI. California courts have defined a "business establishment" under the Unruh Civil Rights Act as a public accommodation providing goods, services or facilities to patrons, Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal.3d 72, 79-80, 707 P.2d 212 (1985), or as an entity with "business-like attributes," which carries on business relationships within the stream of commerce. O'Connor v. Village Green Owners Association, 33 Cal.3d 790, 796, 662 P.2d 427 (1983). Both International and

Duarte sell goods and services to their patrons in exchange for dues, and both operate numerous Rotary-related enterprises, both are "business establishments" covered by the Act. Since the blanket exclusion of women does not serve well-documented safety or special facility concerns, International's conduct is precisely the arbitrary discrimination prohibited by the Act.

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION OVER THIS CASE: SINCE THE FACTS FALL SQUARELY WITHIN ROBERTS, THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

This case poses the question of whether a state can constitutionally apply its public accommodations law to a large, international association that provides business connections and skills

for its members. Just two years ago this Court squarely addressed that precise question in Roberts v. United States Jaycees, 468 U.S. 609 (1984). In that case, the Court held that the application of the Minnesota Human Rights Act to Jaycees to compel the organization to admit women did not violate members' First Amendment freedom of association. Jaycees, a large, non-selective group of businessmen brought together to advance their business and professional interests while performing public works for the community, is remarkably similar to Rotary, also a large, non-selective group of businessmen brought together for similar purposes. Rotary, like Jaycees, is not sufficiently small, selective or exclusive to merit the protection of the fundamental freedom of intimate association accorded spouses and families. To the limited extent that Rotary engages in

protected expression, the compelling state interest recognized in Roberts outweighs the minimal infringement of Rotary's speech, just as it outweighed a greater infringement in Roberts. Because the two groups are strikingly alike, the case at bar is controlled by Roberts. Since this case raises no new situation or issue, there is no substantial Federal question, and, thus, no jurisdiction.

II. ROTARY HAS ONLY LIMITED FIRST AMENDMENT RIGHTS, WHICH DO NOT JUSTIFY THE ORGANIZATION'S DISCRIMINATION IN VIOLATION OF THE UNRUH ACT.

This court has recognized two types of freedom of association protected by the First Amendment. The first is generally referred to as freedom of intimate association, and protects marital and familial relationships. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Zablocki v. Redhail, 434 U.S.

374 (1978). The second, referred to as freedom of expressive association, includes association for the purpose of engaging in protected activity such as speech or religion. E.g., Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982); NAACP v. Button, 371 U.S. 415 (1963).

As an international association with member clubs that are not genuinely selective or exclusive, neither International nor Duarte possesses a fundamental right of freedom of intimate association. To the limited extent that Rotary at any level engages in any protected expression, its interest in freedom of expressive association is outweighed by the state's compelling interest in prohibiting discrimination in business establishments.

Since this case does not involve any fundamental rights, the application of

the Unruh Act, in order to pass constitutional muster, need only bear a rational relationship to a legitimate state interest. This test is clearly met.

A. Rotary, Like Jaycees, Is Not Sufficiently Small, Selective Or Exclusive To Merit The Fundamental Freedom Of Intimate Association Accorded Spouses and Families.

This Court has developed the doctrine of freedom of intimate association in cases involving the highly personal relationships found in marriages and families:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As

> a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of liberty.

Roberts, 468 U.S. at 619-620.

Family relationships are so highly personal that the federal government must intervene in order to protect them from overly intrusive state regulation. Because of the unique nature of these relationships, this protection has been limited to families and surrogate families. See Griswold v. Connecticut, 381 U.S. 479 (1965) (right to make choices about procreation); Eisenstadt v. Baird, 405 U.S. 438 (1972) (same); Roe v. Wade, 410 U.S. 113 (1973) (same); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (same); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) (same); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Loving v.

Virginia, 388 U.S. 1 (1967) (same); Moore . City of Cleveland, 431 U.S. 494 (1977) (right to live with relatives); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (right to raise and educate one's own children); Wisconsin v. Yoder, 406 U.S. 205 (1973) (same); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (same); Meyer v. Nebraska, 262 U.S. 390 (1923) (same); Quilloin v. Walcott, 434 U.S. 246 (1978) (right to parent-child relationship); Stanley v. Illinois, 405 U.S. 645 (1972) (same).

Roberts indicates that even if the Court were to extend stringent constitutional protection to small, selective, and exclusive groups of intimate personal friends, this change would have no effect on large business and civic organizations like Rotary. In Roberts, this Court rejected Jaycees' claim of freedom of intimate association, holding that

Jaycees did not have the attributes necessary to enjoy a constitutionally protected right of intimate association. The Court relied on the fact that: (1) Far from being small, Jaycees had approximately 295,000 members in 7,400 local chapters. Roberts, 468 U.S. at 613. (2) The organization had no objective criteria for admission other than age and sex, and rarely rejected an applicant for any other reason. Roberts, 468 U.S. at 621. (3) Jaycees allowed and, in fact, encouraged women and other non-members to participate in many of the events most central to the organization's recited purpose, including community programs and events. Id.

Thus, Jaycees failed to meet the narrowly drawn requirements of smallness, selectivity or exclusivity that are necessary to establish a fundamental constitutional right of freedom of intimate

association. Rotary has failed to distinguish itself from Jaycees, and so this case falls precisely within this Court's holding in Roberts.

1. Rotary Is Larger Than The Jaycees.

Rotary is actually a much larger organization than the Jaycees, with almost 1,000,000 members in 20,000 local clubs. Appellants' Appendix to Jurisdictional Statement (J.S.App.) F2. Although some local clubs are substantially smaller than the Minnesota Jaycees clubs before the Court in Roberts, many are larger, with some boasting as many as 900 members. J.S.App.G15.

In addition, it is the size of the organization claiming the freedom of intimate association that is both relevant and telling here. Rotary characterizes itself as a "worldwide

fellowship," J.S.App.G44, and emphasizes creating international connections and fostering international understanding. A.60. Members are required to attend a Rotary meeting each week, but they need not attend the meeting of the local club to which they belong (and where, to the extent that it exists at all, intimacy in interpersonal relationships might presumably be found). J.S.App.G23. Rather, members are encouraged to attend meetings of other clubs, as a way to foster international understanding. J.S.App.G24. This fact belies the International's claim that the local clubs and meeting requirements reflect and facilitate the bonds of intimacy that can develop from smallness and that merit extensive constitutional protection.

Far from seeking to be small and intimate, Rotary is constantly seeking to expand and grow. An important Rotary

goal is to make local clubs and International as large as possible. A.62; J.S.App.G33. International urges all local Rotary clubs to engage in active and continuous recruitment of new members by inviting friends and acquaintances to attend meetings and by obtaining as much positive news coverage as possible. A.70-73, 88-89. Thus, an important and acknowledged goal of Rotary is to spread the "Rotary ideal" throughout the community and hence persuade as many influential businessmen as possible to join the organization. A.70; J.S.App.G18. Prospective new clubs must have at least twenty members to become members of International, and clubs that fall below that number are subjects of considerable concern on the part of regional and international Rotary leaders. J.S.App.G21, G60.

2. Rotary Is No More Selective Than Jaycees.

Not only is Rotary intent on not being or remaining small, it also does not protect its allegedly intimate friendships by being highly selective in admitting new members. Although Rotary does conduct a minimal inquiry into a potential member's background, the inquiry is not the kind of selectivity this Court has consistently looked for in intimate association cases. Individual members do not evaluate the applicant to determine if he and they are personally compatible as intimate friends. The applicant is only reviewed by a Board of Directors to determine his reputation and standing in the community. Once approved by the Board, the applicant's name is submitted to the membership. The membership has ten days to object to the applicant's admission. If no one objects, the

applicant is automatically admitted to the local club. Appellants' Brief at 7-8. If a member does object to an applicant, the Board must vote again to approve admission. Appellants' Brief at 8.

While this system ensures that the club will not admit someone with whom a member already knows he does not get along, it does nothing to ensure that applicants whom some members do not know will be personally compatible with the membership. This system reveals the true criteria of Rotary: not personal compatibility, but business and civic suitability. The purpose of Rotary club is not to foster a community of compatible people forming deep and intimate relationships, but rather to bring together influential and upstanding members of the community. Just as in Roberts, therefore, Rotary's selection process fails to

establish the kind or the degree of selectivity that indicates an intimate association.

3. Rotary, Like Jaycees, Is Non-Exclusive.

Finally, as in Roberts, Rotary does not exclude non-members from its affairs or its projects. Just the opposite: International encourages the womens' organizations unofficially affiliated with it to join it in local clubs' performance of their civic duties. A.44, 69. In addition, Rotary urges members to bring to local meetings non-members who might be interested in joining the organization. A.66. Rotary clubs may hold joint meetings with other service clubs. A.39. Members can bring students to meetings on a regular basis J.S.App.66-67. International urges local clubs to organize affiliated student groups, made up of both men and women.

J.S.App.G30. Members are encouraged to involve non-members in study groups addressing international problems. A.60. In short, International encourages members to involve non-members in many different aspects of the organization's activities, in order to give Rotary a good name, to foster its ideals, and to identify potential new members. This lack of exclusivity in the conduct of events and projects is at the heart of Rotary ideal and mirrors the situation posed in Roberts.

Rotary is virtually indistinguishable from the Jaycees in all relevant respects. This Court has already decided in Roberts that clubs such as the Jaycees are not characterized by the highly personal relationships that merit the constitutional protection of the First Amendment Freedom of Association. That

case is controlling and governs the case at bar.

B. Rotary Only Engages In Limited Expressive Activity, And So Is Only Entitled To Limited First Amendment Protection.

A non-intimate group's fundamental freedom of association is limited to its expressive activity. Runyon v. McCrary, 427 U.S. 160, 176 (1976). This fundamental right springs essentially from the freedom of expression. Therefore, to the extent that a non-intimate association exercises its freedom of speech, any infringement of its right to associate that affects that exercise is subject to strict scrutiny. If the infringement serves a compelling state interest and is achieved through the least restrictive means, it may be justified. E.g., Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam); Democratic Party v. Wisconsin, 450 U.S. 107, 124 (1981).

Rotary engages in even less expressive activity than the Jaycees did. Unlike Jaycees, Rotary does not engage in extensive political speech; in fact, it has a specific policy against such speech. A.59. It does, like Jaycees, engage in civic activities that merit First Amendment constitutional protection. Rotary's freedom of association is thus implicated only insofar as the Unruh Act infringes these expressive activities.

III. CALIFORNIA HAS A COMPELLING STATE INTEREST IN PROHIBITING SEX DISCRIMINATION BY BUSINESS ORGANIZATIONS LIKE ROTARY.

The state has a compelling interest in prohibiting gender discrimination in business establishments. This Court has held:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to

> their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life. (citations)

Roberts, 468 U.S. at 625.

As this Court held in Roberts, public accommodations laws that reach "public, quasi-commercial conduct" reflect "a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women. (citations omitted)" 468 U.S. at 626. Businessmen's organizations designed to foster business relationships and civic and business involvement are important tools to that advancement. The leadership skills, business contacts and employment opportunities

provided in such organizations are clearly "goods, privileges, and advantages" to which the state has a compelling interest in ensuring equal access for women. Id. Organizations like Jaycees and Rotary are instrumental in providing these goods, privileges and advantages, both directly through programs and materials provided for members, and indirectly by creating a setting and an atmosphere in which members of the business community can meet, interact, and "network." See, e.g., Burns, The Exclusion of Women from Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality, 18 Harvard Civil Rights - Civil Liberties Law Review 321, 325-334 (1983).

In Roberts, this Court held that in applying its public accommodation law to Jaycees, Minnesota had a compelling interest in eradicating sex

discrimination in the provision of goods, services and the leadership programs, business contacts and employment opportunities that groups such as Jaycees provide. 468 U.S. at 626. An identical interest exists here.

Large civic and business groups like Jaycees and Rotary sell business and employment opportunities, goods, and services to their membership in exchange for membership dues. In Rotary, these benefits include Rotary publications and periodicals, "business relation conferences" and other vocational programs that teach management skills, and most important, the opportunity and facilities to make business and employment contacts.

Although Rotary guidelines allegedly prohibit members using Rotary for commercial advantage, the evidence belies this. Membership selection is categorized by profession. A.36-37.

Retired people cannot be full members. J.S.App.G56. The organization sponsors business-related programs and seminars to teach "management techniques that help improve his own business and professional skills." A.14-21. Clubs are urged to create committees to give "business advice and assistance" to fellow Rotarians, A.40, and publishes a list of hotels owned by Rotary members as well as a list of Rotary emblem licensees. A.75. Many members take a business expense tax deduction for their dues, while many others have their dues paid by their employers or businesses. Rotary Club of Duarte v. Board of Directors, 178 Cal.App.3d 1036, 1056-1057 (1986).

Despite a three-paragraph policy recited in one of the volumes on the Rotary, the actual policy of the organization and the actual practice of its members are clear. One of the main

benefits that members of these organizations obtain by joining these clubs is business advantage in the form of business and community contacts, public exposure and publicity as civic-minded businessmen. Thus, the State has a compelling state interest in preventing arbitrary discrimination in access to these business and employment opportunities.

IV. THE PROHIBITION OF SEX DISCRIMINATION IN BUSINESS ORGANIZATIONS LIKE ROTARY IS THE LEAST RESTRICTIVE MEANS TO ASSURE EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN.

Where a compelling state interest exists, a state regulation is constitutional if it uses the least restrictive means to pursue that interest. Roberts, 468 U.S. at 626. To meet this test, the state must show that it has not significantly infringed expressive rights, or if it has, that the organization's interest in expression is outweighed by the state's compelling interest. Id.

There is no significant infringement of expression unless there is a significant effect on the content of speech. Roberts, 468 U.S. at 627. In Roberts, this Court concluded that the content of Jaycees' speech would not be affected by the admission of women. Although Jaycees did take public positions on political issues, and its members participated in lobbying, fund-raising and other forms of protected expression, there was no reason to conclude that the admission of women would change the content of this expression. Id. This court found that the Minnesota Public Accommodations Act "requires no change in Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." Id. This court specifically rejected the

Jaycees' vague and unsubstantiated claims that women members would necessitate a change in the nature or content of these expressive activities. 468 U.S. at 628.

This Court's holding in Roberts rejecting these claims is fully applicable to the case at bar. Rotary's protected expressive activity is virtually identical to the Jaycees', except that Rotary does not even take public positions on political issues. There can be no doubt that, like the Minnesota Act, the Unruh Act does not affect the Rotary goal to "provide humanitarian service, encourage high ethical standards in all vocations, and help build good will and peace in the world," A.35, and does not require Rotary to admit anyone whose philosophy or ideology differs from those of existing members. In fact, unlike the Jaycees, International has not even asserted that the admission of women

would affect the content of its expression. Instead of demonstrating that the content of its speech will be affected, International claims that (a) Rotary members prefer that the organization remain exclusively male, and (b) the international nature of the organization requires that it remain exclusively male. Both of these purported interests fail to demonstrate an infringement of expression substantial enough to outweigh the compelling state interest involved.

The personal preferences of the members may affect their decision to belong to the organization, but unless the admission of women will significantly change the content of the organization's speech, the First Amendment does not protect members' preferences. The practice of illegal discrimination, including discrimination against women, is not a protected activity. E.g., Runyon v.

McCrary, 427 U.S. 160, 176 (1976); Hishon v. King & Spaulding, 467 U.S. 69, 75 (1984). "[T]he constitution ... places no value on discrimination ..." and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment ... it has never been accorded affirmative constitutional protection." Norwood v. Harrison, 413 U.S. 455, 469-470 (1973). The expression of support for such discrimination is, of course, protected, but no such expression exists here.

Herbert Pigman, General Secretary of Rotary International and the most senior full-time employee of that organization, could not even state what effect the admission of women would have on Rotary. The most he could do was to "conjecture" that members "don't quite know what will happen" but feel that

"Rotary's effectiveness and service objectives might be somehow jeopardized if the change were to come before they feel they are ready for it." J.S.App. G-53. This is hardly a showing of a significant infringement of expressive rights.

International is arguing that it should be exempt from the clear state policy prohibiting discrimination, simply because many of its members find that policy distasteful. If the organization were truly private, and did not sell goods, privileges and advantages to its members, the state would have no compelling interest in regulating it, and members would be free to implement their personal preferences. But where a compelling state interest exists, a personal preference for illegal discrimination of course cannot exempt an organization or business from state law. Employers who

would personally prefer not to hire minorities or women and who would feel more comfortable working only with white employees, are still required by law to hire minorities and women: the state's compelling interest in prohibiting employment discrimination overrides that personal preference. The same is true where an employer feels that his or her customers will not feel comfortable conducting business with minority or women employees: The compelling state interest justifies prohibiting discrimination despite these perceived customer preferences. 29 C.F.R. § 1604.2(a)(1)(iii). Given that a compelling state interest does exist in this case, the personal preferences of members are irrelevant.

International also argues that members from other countries with different cultural values will be alienated from Rotary if women are admitted to clubs in

the United States. It is unclear how this affects expression to any great degree, and it is also unclear to what extent it is true. Assuming, for the sake of argument, however, that International's prediction is correct, the argument still fails. International has faced this problem before, and has elected to support United States law even at the risk of losing foreign members. There are a number of Rotary clubs in South Africa, and yet clubs in this country still admit blacks and other ethnic minorities, even though a white South African member having contact with a United States club might well be offended or troubled by that admission policy.[1/]

1/ In fact, International is even willing to force chapters in other countries to comply with United States law. Local clubs are not permitted to include a provision in their local club constitutions that excludes anyone from membership on
(footnote continued)

Thus, the organization has willingly weathered the risks that complying with United States law allegedly poses to its organization, without protesting that its expressive rights have been infringed. To require Rotary to fully comply with state law prohibiting gender discrimination poses no greater risk, and certainly not enough of one to outweigh the compelling state interest.

The content of Rotary speech and philosophy is virtually identical to that of Jaycees', and, like Jaycees, International has failed to show that either of these will be altered by the admission of women as a class. Accordingly, the holding in Roberts that there is no significant infringement of First

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the basis of race, religion and national origin. J.S.App. F-6; G-68, 69.

Amendment freedom of expressive association rights in such a situation, applies with equal force to the case at bar.

V. THE UNRUH ACT AS APPLIED TO ROTARY IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Since fundamental freedom of association rights protected under the First Amendment are not implicated, the Unruh Act as applied to Rotary need only be rationally related to a legitimate state interest. Given that there is a compelling state interest in prohibiting gender discrimination by Rotary, there can be no doubt that the state has a legitimate interest in the same end. Since the Unruh Act was drafted and is applied specifically to eliminate gender discrimination in business establishments like Rotary, it is rationally related to that end.

VI. THE DEFINITIONS OF BUSINESS ESTABLISHMENT AND ARBITRARY DISCRIMINATION UNDER THE UNRUH ACT ARE NOT VAGUE, AND BOTH INTERNATIONAL AND DUARTE FALL WITHIN THEM.

A. California Courts Have Provided Clear And Definite Guidelines For The Definition Of "Business Establishment."

A "business establishment" under the Unruh Act is one that is either a "public accommodation" or possesses sufficient "business attributes." See e.g., Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal.3d 72, 81-82, 707 P.2d 212 (1985); O'Connor v. Village Green Owners Association, 33 Cal.3d 790, 796, 662 P.2d 427 (1983). In neither case is it necessary that the establishment be organized for profit. O'Connor, 33 Cal.3d at 796. Horowitz, The 1959 California Equal Rights in "Business Establishments"

Statute - A Problem in Statutory Application, 33 So. Cal. L. Rev. 260, 290-291 (1960).

As Appellants acknowledge, the phrase "public accommodation" has appeared in civil rights legislation in many states, and its scope is generally accepted as including entities that provide goods, services or facilities to their clients, patrons or customers. Appellant's Brief at 43; Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 500, 468 P.2d 216 (1970); Isbister, 40 Cal.3d at 79-80. In distinguishing genuinely private clubs that provide goods, services, or facilities to their members, California courts, as well as Courts in other jurisdictions, have considered two factors: size, and selectivity. If an organization has no limit on the size of its membership, or if it is not selective except in excluding the particular class

of persons at issue, it is not a private club, and will instead be considered a "public accommodation." Isbister, 40 Cal.3d at 81, 84; Curran v. Mount Diablo Council of The Boy Scouts of America, 147 Cal.App.3d 712, 731-732, 195 Cal.Rptr. 325 (1983); United States Jaycees v. McClure, 305 N.W. 764, 770 (1981); Nesmith v. Young Men's Christian Association, 397 F.2d 96, 101 (4th Cir. 1968).

The second prong of the "business establishment" definition involves "businesslike" attributes. Even when an entity is not engaging in the extensive provision of goods, services or facilities to the public, it may be a "business establishment" if it conducts its affairs as a business, and puts itself in the stream of public commerce. As a leading commentator on the Unruh Act noted, the Act was intended not so much to cover

business places as to cover relationships that involve extending advantages, goods, services or facilities and that are relatively non-continuous, non-personal and non-social. Horowitz, supra, at 287-289. Thus, it is the nature and purpose of the relationship that defines whether the entity has "businesslike attributes." That relationship may involve providing "accommodations, advantages, facilities, privileges or services." Unruh Civil Rights Act, Civil Code Section 51 (1982); O'Connor, 33 Cal.3d at 796. For example, a condominium-owners association that handled management, insurance, maintenance, and repair for the condominium project was held to be a "business establishment" covered by the Unruh Act. O'Connor, 33 Cal.3d at 796. Although the association was a nonprofit organization providing services only to

its limited number of members, it was performing "all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders." Id.

Neither of these definitions of "business establishment" are overbroad. It is a desirable and logical result that an entity that provides goods, services, facilities or advantages to the public, and does not enforce size or membership restrictions, can and should have its admission policies regulated by the state, which has a strong interest in prohibiting discrimination in public accommodations. As Justice O'Connor noted in the context of freedom of association, "an association must choose its market. Once it enters the marketplace of commerce, in any substantial degree, it loses the complete control over its membership that it would otherwise enjoy

if it confined its affairs to the marketplace of ideas." Roberts, 468 U.S. at 636 (O'Connor, J., concurring).

This reasoning applies equally when an entity makes its goods, services, facilities or advantages available only to a genuinely limited membership. If it conducts itself like a commercial business, it should be treated like one. If, however, a purely social club is characterized by continuous, personal and social contacts, and is providing goods to its members only as an incidental and insubstantial aspect of its operation, it is acting outside the commercial sphere, and the state does not have a compelling interest in regulating it.

The Unruh Act, of course, prohibits only arbitrary discrimination. A business establishment may limit its numbers, or may limit its membership to those interested in, experienced in or in need

of its services, as long as the exclusion bears some rational relationship to the purpose of the organization.

B. International And Duarte Come Within Both Definitions Of "Business Establishment."

Both International and Duarte are "public accommodations" under the Unruh Act. As has been demonstrated, the process of membership selection is minimal and not designed to ensure congeniality or the likelihood of continuous, personal and social relationships. Additionally, there is no limitation on the number of members of local groups, or on the number of clubs in International. In fact, just the opposite is true: International requires that a prospective club have a minimum number of members in order to join International, and provides substantial resources and pressure to expand the local and International membership. E.g. J.S.App.G21; A.50-53, 61-66,

70-71. Duarte is a typical example of a club considered to be foundering because of its waning membership. Under the test articulated in Isbister and Curran, as well as courts in other jurisdictions, neither Duarte nor International are genuinely private clubs exempt from the provisions of the Unruh Act.

Both Duarte and International also possess substantial "businesslike attributes." Both market goods, services, facilities and advantages to their members in the exchange for club dues. E.g. A.21. Both provide program materials and resources for improving business and management skills and organizing civic events. E.g. A.14-21, 92-93 In addition, as The Court of Appeal noted, Rotary extends substantial business advantages to its members. Despite the club's written policy, the contacts and forum it provides make a substantial

difference for its members, a fact to which many members testified at trial. Rotary, 147 Cal.App.3d at 1057. See also, A.42. Many members deduct their Rotary dues on their tax returns as a business expense, with the approval of the I.R.S. Rotary, 147 Cal.App.3d at 1057. Many others have their dues paid by their employers or businesses, because Rotary membership has proved to be good for business. Id.

International is a nonprofit corporation recognized under Illinois State law. It includes a 'publishing house' division that produces an extensive library of Rotary books, manuals, pamphlets, and periodicals. Id. at 1053. It produces training and public relations materials for distribution to local clubs, e.g. J.S.App.G9-12, A.14-21, it publishes and sells subscriptions to the official magazine of the Rotary in

two languages, A.57, it licenses and collects royalties for the use of the Rotary emblem, A.67, and it publishes and distributes a directory of Rotary members, hotels run by Rotary members, and firms licensed to use the Rotary emblem. Id. at 1054-1055.

Duarte subscribes to these extensive goods and services by paying annual dues and remaining a member of International. Members of Duarte would not otherwise be able to receive the benefits provided by International, since International has no individual members. J.S.App.C4-5 Therefore, Duarte plays a vital role in the functioning of International's business and so takes on the latter's businesslike attributes.

If International and Duarte fit into only one of the two possible definitions of a business establishment, this fact alone would be enough to bring them within the scope of the Unruh Act, since the definitions are in the alternative. See, O'Connor, 33 Cal.3d at 796; Isbister, 40 Cal.3d at 83. Since each organization falls within both possible definitions, each is a business establishment, and each is subject to the provisions of the Unruh Act.

C. The Exclusion Of Women From Rotary Is Arbitrary And Therefore Prohibited By The Unruh Act.

The Unruh Act prohibits any arbitrary discrimination by business establishments. In re Cox, 3 Cal.3d 205, 216, 474 P.2d 992 (1970). While owners of business establishments may certainly exclude individuals who act inappropriately or who disrupt the operations of

the enterprise, "the Unruh Act does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class "as a whole" is more likely to commit misconduct than some other class of the public." Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 738-739, 640 P.2d 115 (1982).

The blanket exclusion of a particular class of individuals may not be arbitrary if it operates as a "reasonable and permissible means under the Unruh Act of establishing and preserving specialized facilities for those particularly in need of such services or environment." Marina Point, 30 Cal.3d at 742-743. Thus, housing facilities specifically designed and administered for the elderly might properly exclude young children. Id. The social need such facilities serve, however, must be well-documented and clearly

established as a matter of public policy. Id. Where activities and facilities are unsafe or unsuited for an entire class of individuals, that class may properly be excluded from them. Isbister, 40 Cal.3d at 88.

Where, however, the business establishment cannot show that the admission of the excluded class poses a danger to safety or a serious and documented threat to the continued operation of the establishment, the Unruh Act unambiguously prohibits the continued exclusion of the class. Id. at 89-90.

Appellants claim that the Unruh Act is vague because it "prohibits some forms of discrimination but not others" and because "good faith and bare rationality" are not sufficient to permit blanket group discrimination. Appellants' Brief at 42. But it is of course in the nature of all anti-discrimination laws that some

types of discrimination are excused or justified, while others are prohibited. The Unruh Act permits business establishments to exclude individuals for reasons "rationally related to the services performed and facilities provided." In re Cox, 30 Cal.3d at 212.

International seeks a blanket exclusion of women as a class from Rotary, but it has failed to indicate any safety or suitability concerns justifying the exclusion. International has not demonstrated or even claimed that the admission of women would prevent the club from performing civic activities, or that it provides services to its members that are unsafe or unsuitable for women. Instead, it has simply alleged that women as a group prevent the formation of a friendly, civic-minded group that can effectively develop and implement programs for community involvement. This is

precisely the type of discrimination based on a broad, undocumented generalization about a class of individuals that the Unruh Act and similar state and federal legislation is designed to prohibit. If an individual woman or man were to disrupt the organization's operations, the Unruh Act of course does not prohibit the organization from excluding that individual. It is the unfounded and blanket exclusion of an entire class of individuals that is prohibited under the Unruh Act.

The Unruh Act has clearly and unambiguously prohibited arbitrary discrimination in business establishments. Since both International and Duarte fall squarely within both definitions of a business establishment, and since the blanket exclusion of women as a class from the Rotary is arbitrary, the California Court of Appeal correctly held

that International's discriminatory policies violate the Unruh Act.

CONCLUSION

This case presents the question of whether a state may prohibit sex discrimination in large, unselective businessmen's organizations that sell leadership training, business contacts, and employment opportunities to their members. As this Court determined in Roberts, such a prohibition does not infringe members' First Amendment rights. This case does not involve the fredom of intimate association, since this Court has consistently reserved that fundamental right to familial relationships. Since Rotary only engages in limited expression, it only has minimal freedom of expressive association. California's compelling interest in prohibiting sex discrimination in

business organizations, an interest this Court recognized in Roberts, justifies the minimal infringement of those rights. The admission of women would not affect the content of of Rotary's speech, and therefore the application of the Unruh Act to Rotary is the least restrictive means of accomplishing the state's interest.

The Unruh Act and subsequent judicial interpretation of the Act have clearly defined "business establishments" to include both public accommodations and entities with sufficiently business-like attributes. Since Rotary is large and unselective, sells its goods and services to members in exchange for dues, and operates as a publishing, conference-organizing, and licensing enterprise, it fits within both possible definitions of "business establishment." The blanket exclusion of women from Rotary does not

reflect well-documented safety or special facility concerns and therefore constitutes precisely the type of arbitrary discrimination prohibited by the Act.

Respectfully submitted,

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